ROBERT A. BICE, JR.

IBLA 76-10 Decided November 3, 1975

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring homestead notice of location AA-8780 unacceptable for recordation.

Affirmed as modified.

1. Alaska: Homesteads -- Applications and Entries: Valid Existing Rights -- Settlements on Public Lands -- Withdrawals and Reservations: Effect of

   A homestead notice of location filed for lands open to location is acceptable for recordation. Where a homestead settler has marked the corners of his claim by posts prior to a withdrawal subject to valid existing rights, the claim survives the withdrawal if the location notice requirements have been satisfied.

2. Homesteads: Residence

   A homestead claimant who fails to establish residence on the land within 1 year after initiating the claim has failed to comply with the law and his entry must be canceled.

APPEARANCES: Robert A. Bice, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Robert A. Bice, Jr., has appealed from the decision of the Alaska State Office, Bureau of Land Management, that held his notice of location and settlement of homestead AA-8780 was unacceptable for recordation. Mr. Bice filed the notice on

January 23, 1974, pursuant to section 2 of the Act of April 29, 1950, 43 U.S.C. § 270-5 (1970), amending the Alaska homestead laws, 43 U.S.C. §§ 270 through 270-17 (1970). Appellant's notice of location asserted settlement on approximately 160 acres described by metes and bounds in protracted section 19 of unsurveyed T. 9 N., R. 3 E., S.M., Alaska, on January 28, 1974. He also stated that the corners of the claim were marked by 4 x 4 posts, a fact later verified by field examination.

By decision dated May 13, 1975, the State Office held the notice of location unacceptable for recordation on the grounds that the locator had not, according to three field examinations, improved or resided on the land: (a) prior to the withdrawal of the land by Public Land Order (P.L.O.) 5418, 39 F.R. 11547 (effective March 28, 1974); and (b) within the 6-month period following the filing of the location notice required by 43 CFR 2567.5(a)(1).

[1] P.L.O. 5418, 39 F.R. 11547 (1974), amended, P.L.O. 5180, 37 F.R. 5583 (1972), to withdraw subject to valid existing rights "[a]ll unreserved public lands in Alaska * * *" for classification. Unless appellant had a valid existing right on the March 28, 1974, effective date of P.L.O. 5418, when the land described in his location notice was withdrawn, his rights under the Alaska homestead law were cut off.

The Department has held, with respect to claims under section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970), that the filing of a notice of location under section 5 of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), in the absence of occupation and improvements on the land, does not vest in the locator a valid existing right that prevents the attachment of a withdrawal to the land. Donald Richard Glittenberg, 15 IBLA 165 (1974); Peter Pan Seafoods, Inc. v. Shimmel, 72 I.D. 242, 245 (1965); Loran John Whittington, A-28823 (August 18, 1961). The cited cases relate to such claims as trade and manufacturing sites and headquarters sites. However, with respect to homestead settlement claims it has long been the position of the Department that a settlement right is created by "one who goes upon the public land with the intention of making it his home under the settlement laws and does some act in execution of such intention sufficient to give notice thereof to the public." Franklin v. Murch, 10 L.D. 582, 583 (1890).

In Bowman v. Davis, 12 L.D. 415, 416-17 (1891), the Department stated:

> This definition of a settler does not, in my judgment, require that such act should necessarily be done in connection with his residence on the land, such as commencing the erection of a house to reside in, but it may be any visible act tending to disclose a design to appropriate the land under and in accordance with the pre-emption laws.
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> The fact that Bowman did not intend to use the stones that were piled together for the construction of a house, well, or fence or for any other purpose, except to get them out of the way of the plow, is not material, if it should appear that such acts were done in contemplation of appropriating the land under the settlement laws, and were such as were discoverable by a person examining the land with the view of entering the same.
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> In the case of Etnier v. Zook, 11 L.D., 452, the act of settlement on the part of Etnier, which gave her priority, consisted in surveying the land and "throwing up sod mounds on the boundaries of her claim." This was not a permanent improvement, nor did it relate to the preparation or construction of a home on the land, but was held to be a sufficient act of settlement to hold the claim.
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> It is sufficient that some act is done denoting an intention to claim the land under the settlement laws, and although such act has no immediate or direct relation to preparing or constructing a residence thereon, it will be presumed that it was done in furtherance of an intent to comply with the law, one of the requisites of which is that he shall make his home on the land.

See also Warren v. Gibson, 29 L.D. 197, 200 (1899).

Thus it appears that the cases cited in the decision below are not apropos to what constitutes an initiation of a homestead settlement claim sufficient to survive a withdrawal subject to valid existing rights. Residence and improvements are not

required to initiate such a claim. In those circumstances, it was error to treat the location notice as unacceptable for recordation for the reasons set forth in the State Office decision. The requirement that residence be established on the claim is a discrete requirement and will be treated infra.

A notice of location filed for land which is open to such location at the time of filing is acceptable for recordation. Ray W. Ferguson, 22 IBLA 160 (1975); Elden L. Reese, 21 IBLA 251, 252 (1975); James Milton Cann, 16 IBLA 374, 377 (1974). See BLM Manual § 2563.1.11-12. In fact, the master title plat for the township involved properly shows homestead location AA-8780, as the land was open to such filing in January 1974.

[2] Appellant's claim must fall for a different reason. The State Office decision of May 13, 1975, adverted to 43 CFR 2567.5(a)(i) which requires that residence must be established on the claim within 6 months from the date of entry, and in certain limited circumstances within 1 year from such date. See Henry J. Ernst, A-27196 (November 7, 1955). The decision also recited that three field examinations of the land had failed to reveal any improvements or any evidence of use or occupancy by appellant.

Appellant does not question the conclusion that he did not commence residence on the claim within 1 year from entry, but rather seeks to excuse his failure to do so by stating that he has purchased all the building supplies necessary for use in building a residence on the claim, but that he has had his difficulties with contractors trying to get a road built to the land. See Hulse v. Griggs, 67 I.D. 212 (1960).

We are cognizant of the difficulties encountered by appellant in his efforts. But the law is well settled that a homestead claimant must establish a residence on his claim within 1 year from the date of entry or suffer the cancellation of his claim. Melvin O. Wright, A-30839 (December 29, 1967); Arnold H. Echola, A-30831 (November 16, 1967). It follows that appellant's claim must be canceled since he has implicitly conceded his failure to establish residence timely.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Frederick Fishman
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge